



In the Supreme Court of the United States

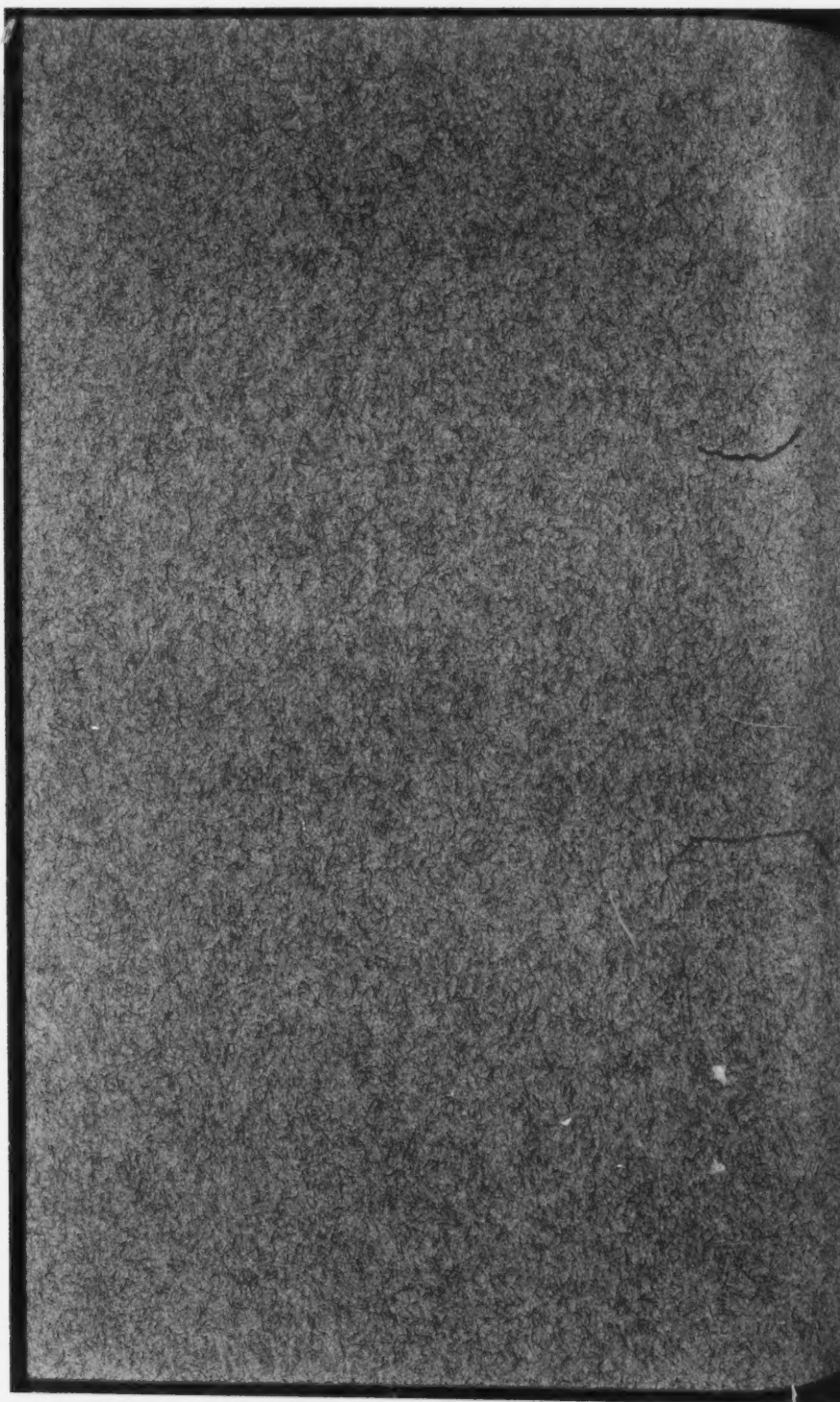
October Term, 1942

ALEX W. ASHLEY, DOING BUSINESS AS ALEX W. ASHLEY,
BUILDING MAINTENANCE CO., PETITIONER

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION FOR WRIT OF HABEAS CORPUS
STATES CIRCUIT COURT OF DISTRICT OF COLUMBIA
CIRCUIT

BRIEF FOR THE PETITIONER



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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 380

ALEX WASLEFF, DOING BUSINESS AS ALEX WASLEFF
BUILDING MAINTENANCE CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN
OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 3 (1)-3 (7)) is reported in 134 F. (2d) 981. The findings of fact, conclusions of law, and order of the National Labor Relations Board (P. A. 60-96) are reported in 41 N. L. R. B. 843.¹

¹ The order of the Board, which the Circuit Court of Appeals enforced, was directed to two parties: petitioner and Butler Brothers, hereinafter referred to as Butler. The latter filed a separate petition for certiorari in *Butler Brothers v. National Labor Relations Board*, No. 274, this Term, filed

JURISDICTION

The decree of the Circuit Court of Appeals was entered on June 4, 1943 (R. 6-8). An order extending the time within which to file a petition for certiorari to and including September 24, 1943, was entered by a Justice of this Court on September 4, 1943. The petition for a writ of certiorari was filed September 24, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth at pp. 24-28 of the Board's brief in opposition to the petition for certiorari in No. 274.

QUESTIONS PRESENTED

1. Whether the Board properly found that an individual who pays the wages of certain employees, provides appropriate insurance covering their operations and a part of the materials used in their work, has authority to hire and discharge

August 19, 1943. Petitioner has requested that the record in No. 274 stand as the record in this case (Pet. 2). The appendices filed by Butler and the Board in the court below are referred to as "P. A." and "B. A.," respectively. The printed proceedings in the court below are referred to as "R."

them, and claims to be their employer, is their employer within the meaning of the Act.

2. Whether the unfair labor practices of an individual who, together with a company extensively engaged in interstate commerce, is the joint employer of employees who perform maintenance and custodial work and operate passenger and freight elevators in a building leased to tenants there engaged generally in the manufacture, sale, and distribution of goods and merchandise throughout the United States, affect commerce within the meaning of the Act.

3. Whether there is substantial evidence to support the findings of the Board, which were sustained by the court below, that (a) Butler and petitioner entered into a contract whereby petitioner agreed to provide maintenance service to Butler in order to facilitate an evasion of the Act, (b) petitioner discriminated with respect to the hire or tenure of nine named employees, and (c) that by these and other acts petitioner interfered with, restrained, and coerced his employees in the exercise of their organizational rights in violation of Section 8 (1) and (3) of the Act.

STATEMENT

After the usual proceedings, the Board issued its findings of fact, conclusions of law, and order

(P. A. 60-96)² which have been summarized in part, together with reference to the supporting evidence, at pp. 3-13 of the Board's brief in opposition to the petition for certiorari in No. 274. The additional findings of fact, conclusions of law, and portions of the order of the Board which refer more specifically to petitioner may be briefly summarized as follows:

Petitioner performs janitor, watchman, doorman, elevator, and window cleaning services for various concerns in Chicago, Illinois (P. A. 65; 759-760). Pursuant to a contract between petitioner and Butler dated June 6, 1940, which by its terms became effective July 1, 1940, petitioner agreed to furnish to Butler janitor, watchman, and elevator service in the latter's building known as Building B (P. A. 65; 987, 991, Br. Opp. 4).³

The employees here involved, namely the janitors, watchmen, and elevator operators employed in Building B (hereafter referred to as the maintenance employees), perform services directly connected with, and for the benefit of, Butler and numerous tenants in the building. The latter are

² In the following statement, the references preceding the semicolon are to the Board's findings and the succeeding references are to the supporting evidence.

³ The term "Br. Opp." refers to the Board's brief in opposition in No. 274. In order to avoid repetition, we thus direct the Court's attention to matter contained in that brief which is relevant here.

engaged generally in the manufacture, sale, and distribution of goods throughout the United States, and ship from the building and receive there large quantities of goods and merchandise moving through interstate channels. Br. Opp. 4-5.)

Pursuant to the above-mentioned contract, petitioner paid the maintenance employees, provided appropriate insurance covering their operations and a part of the materials used in their work, and had authority to hire and discharge them (P. A. 71; 987-990). Petitioner claimed before the Board that by virtue of the above contract he became the sole employer of the employees after July 1, 1940 (P. A. 75; 47). However, subsequent to the effective date of the contract, petitioner's operations in the building remained, at all times here material, subject to the substantial control of Butler with respect to the work performance, the hire and tenure of employment, and the labor relations policies affecting the maintenance employees (Br. Opp. 9-12). Upon the above facts, the Board found that, subsequent to July 1, 1940, petitioner shared with Butler the role of an employer within the meaning of the Act, and that unfair labor practices occurring in connection with the operations in Building B affect commerce within the meaning of the Act (P. A. 65, 75-76, 92, 94).

At the time petitioner took over the operation of Building B, he was aware of the widespread union activity of the employees involved herein and of Butler's hostility to their organizational efforts which had resulted in the formal transfer of the work to petitioner (P. A. 84-85, 86; 521-522, 554, 542, 228, 288-289, 250, 294, 421-422, 425, Br. Opp. 6-12). Petitioner continued the anti-union campaign which Butler had initiated. Thus, soon after petitioner commenced operations in the building, his supervisors interrogated employees about their union affiliations, attempted to persuade them to report the presence of any union officials in Building B to petitioner or to Butler, disparaged the union leaders, stated that one supervisor's job was to see that union employees were eliminated from the staff in a manner to avoid the appearance of illegality, and announced flatly that a union was not wanted in Building B. (P. A. 78-79, 81, 83-84, 86-87; 228, 288-289, 203-204, 294.) Petitioner furthered Butler's design to undermine union activity in Building B by removing from the building, during August and September 1940, nine union members. These included the most ardent union protagonists. (P. A. 86-88; 814-815, 854-856, Br. Opp. 11-12.)⁴

⁴The removal of the nine employees in question, all of whom had seen substantial service with Butler, to other buildings serviced by petitioner, and the subsequent dis-

The Board found that by the foregoing conduct, petitioner, with Butler, interfered with, restrained, and coerced the employees in the exercise of their organizational rights and discriminated with respect to the hire and tenure of employment of the nine maintenance employees in question, in violation of Section 8 (1) and (3) of the Act (P. A. 88).

In October 1940, many of the employees in Building B went on strike. Petitioner at first refused to reinstate the strikers and finally agreed to do so only if O'Grady, the Union's business agent, would "stay out of the picture". (P. A. 90; 484-485, 678-681.) Before permitting the striking employees to return to work, petitioner's officials held a meeting with them on the premises at which they stated to the employees that the building had been operating successfully without organized labor and without the strikers; announced that petitioner would have nothing to do with O'Grady or with Local 66; characterized union leader Walter Ledford as a "troublemaker" for both petitioner and Butler; declared that Ledford could not continue to serve as the union steward of the employees in Building B, and that both

charge of seven of the nine within a short time after their transfer, fulfilled Butler's threat that a number of veteran employees would lose their jobs if union activity persisted (Br. Opp. 6-12).

Ledford and O'Grady had been warned to stay away from the building; and disparaged the Union (P. A. 91; 334-336, 357-359, 383-384). Immediately after the strike, Brandt, the one veteran employee who had not joined the strike, was promoted by petitioner and given an increase in pay (P. A. 91; 888-889, 384-385, 873).

The Board found that, by the foregoing conduct, petitioner further interfered with, restrained, and coerced his employees in the exercise of their organizational rights, thereby violating Section 8 (1) of the Act (P. A. 91).

The Board ordered petitioner and Butler, jointly and severally, to cease and desist from their unfair labor practices, to reinstate to their former or substantially equivalent positions in Building B the nine employees discriminated against, with back pay to eight of them, and to post appropriate notices (P. A. 94-96). It further ordered that the reinstated employees be restored by Butler to all their former rights and privileges by whatever steps might be necessary, including cancelation or modification of the contract with petitioner (P. A. 96).

On March 31, 1943, the court below handed down its opinion enforcing the Board's order with modifications not here in issue (R. 3 (2)-3 (7)). On April 15, 1943, petitioner requested a rehearing, which the court denied on May 21, 1943, and on June 4, 1943, a decree was entered (R. 4, 5-8).

ARGUMENT

1. Any challenge of the Board's finding that petitioner was an employer of the employees involved herein (Pet. 8, 9, 10) has no rational foundation, as the facts summarized in the Statement (*supra*, p. 5) establish. Indeed, petitioner insisted before the Board that he was the sole employer of these employees (*supra*, p. 5). Cf. *Gray v. Powell*, 314 U. S. 402, 414. The Board's finding that, under the circumstances here present, petitioner shared the status of employer with Butler,⁵ does not, contrary to petitioner's claim (Pet. 8, 10), disable petitioner from complying with the portions of the Board's order addressed to it. And the status of other building owners who deal with petitioner is not here in issue and would depend on the peculiar facts of each case.

2. Petitioner's contention (Pet. 5-6, 9, 11-12) that the Act may not be applied to the operations in Building B is plainly without merit. The court below, upon a consideration of the facts, properly found petitioner's operations to be subject to the Act upon principles established by this Court (R. 3

⁵ The Board did not find, as petitioner asserts (Pet. 8, 10), that petitioner was merely an employee. It commented upon the fact that the operations in Building B after the contract cast petitioner in a somewhat subordinate role (P. A. 75) and found that petitioner and Butler were both employers of the employees involved herein within the meaning of Section 2 (2) of the Act (P. A. 76). Cf. *National Labor Relations Board v. Long Lake Lumber Co.*, decided October 18, 1943 (C. C. A. 9).

(3)-3 (4)). No other result is possible and no conflict of decisions is raised by the court's holding.

The widespread effect upon the free flow of interstate commerce which would ensue if the employees herein failed to discharge their duties is patent upon the record. Freight elevator service, which in itself constitutes an indispensable initial or terminal stage in the regular and extensive journeys of merchandise to and from interstate channels, would be halted; the essential precautionary measures required for the protection of large quantities of goods, interstate in origin or destination, would not be taken; the maintenance of proper working conditions under which large-scale commercial activities may be conducted would be impaired. The test of jurisdiction laid down in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 41, whether "stoppage of * * * operations by industrial strife" in the enterprise in question would result in substantial interruption to or interference with the free flow of commerce is thus fully met here. Compare *National Labor Relations Board v. Fairblatt*, 306 U. S. 601; *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197; *Kirschbaum Co. v. Walling*, 316 U. S. 517.^o

^o *Walling v. Goldblatt Bros.*, 128 F. (2d) 778 (C. C. A. 7), relied on by petitioner (Pet. 5), is not in point as is manifest from the face of the opinion (128 F. (2d) at 783-784). Cf. *Kirschbaum Co. v. Walling*, 316 U. S. 517, 522-523.

3. The contention (Pet. 4-5, 10, 13-15) that the Board's findings that petitioner violated Section 8 (1) and (3) of the Act are not supported by substantial evidence presents no question warranting review. Further, the evidence summarized in the Statement (*supra*, pp. 6-8) affords full support for the challenged findings as the court below held (R. 3 (5)-3 (7)). Contrary to petitioner's apparent contentions (Pet. 10, 13-15), the First Amendment does not require the Board to disregard all verbal evidence of unfair labor practices.⁷

The objection that the court below applied an improper standard of review (Pet. 9, 13) has been fully answered in the brief in opposition in No. 274, pp. 18-19.

Finally, since the Board found that the contract constituted a collaboration between petitioner and Butler for an illegal purpose (P. A. 85-89), its order properly required that the contract be canceled or modified if necessary to restore the *status quo* (P. A. 96). Cf. *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 355.

⁷ *National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U. S. 469, relied on by petitioner (Pet. 13), plainly does not so hold. See *National Labor Relations Board v. Chicago Apparatus Co.*, 116 F. (2d) 753, 756-757 (C. C. A. 7).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be denied.

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